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November 17, 2016

By ECF

Judge Ann M. Donnelly
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Simmons et al. v. County of Suffolk et al.*, 2:14-cv-03884-AMD-ARL

Dear Judge Donnelly:

We represent the Plaintiff in this case. We write pursuant to Local Rule 54.1(c)(3) to request that the Court approve Plaintiff's retention of Dr. Michael Baden to serve as an expert witness in this case with respect to the cause of the decedent's death and the extent of his conscious pain and suffering.

Rule 54.1(c)(3) provides that even if Plaintiff is the prevailing party in this fee-shifting case, expert witness fees generally are not recoverable from Defendants "unless prior court approval was obtained" by Plaintiff. Conversely, if Plaintiff receives the Court's prior approval to retain Dr. Baden, then Dr. Baden's fee will be a taxable cost at the conclusion of the case if Plaintiff prevails. *See, e.g.*, *Nicholson v. Williams*, 2004 WL 4780498, at *29 (E.D.N.Y. Apr. 29, 2004) (approving expert fee under Rule 54.1(c)(3)). We respectfully submit that such approval should be granted here.

There should be no dispute regarding the cause of death in this case. The autopsy report, which is attached hereto as Exhibit A, states that the manner of death was a "homicide (injured by others)" and that the cause of death was "sudden death during violent struggle including prone positioning and chest compression in a person with obesity with hypertensive cardiovascular disease." The medical examiner's findings are consistent with the gravamen of the officers' testimony in this case, which is that one or more officers were placing weight on the decedent's back and/or side for several minutes while he was rear-handcuffed and lying in an at least partially face-down position. Each of the officers admitted during their depositions that they received training on the fact that placing weight on a subject who is in a prone position creates a significant risk of asphyxia. It is undisputed

that the decedent suddenly went into cardiac arrest after significant weight was put on him for several minutes while he was rear-handcuffed and lying chest-down and/or on his side. He obviously asphyxiated.

Because there is no basis for Defendants to dispute that the decedent asphyxiated, Plaintiff has proposed that the parties enter into stipulations regarding the cause of death in order to streamline this case. Defendants have thus far declined to enter into such stipulations, opting to preserve their right to argue at trial that the decedent did not asphyxiate. Defendants correctly observe that for whatever reason, the autopsy report does not actually use the word "asphyxiated." We respect Defendants' right to decline to enter into stipulations regarding the cause of death, but their decision not to do so renders it necessary for Plaintiff to retain an expert pathologist to confirm that the decedent asphyxiated.

Dr. Baden is highly qualified. He is a board-certified forensic pathologist who has authored or co-authored more than 80 professional articles and books on aspects of forensic medicine and served as a testifying and/or consulting expert in many high-profile cases, including the murder trials of O.J. Simpson, Phil Spector, and Claus von Bulow, and the deaths of John Belushi, Sid Vicious, and Czar Nicholas II. His full bio is available at: https://drmichaelbaden.com/bio/. Dr. Baden's fee for investigating the case and providing an expert report is $8,500.00.

To be clear, we are not asking the Court to pay Dr. Baden's fee or to direct Defendants to pay his fee at this time. Regardless of whether the Court grants this application, Plaintiff will pay Dr. Baden's fee in the first instance. We only are asking the Court to approve of his retention pursuant to Rule 54.1(c)(3), such that Plaintiff will be entitled to reimbursement at the end of the case if Plaintiff is the prevailing party. We further confirm that we are not asking Defendants to waive their right to challenge Dr. Baden's fitness to testify (though any such challenge would be meritless). If this application is granted, Defendants will be free to argue later that Dr. Baden should not be permitted to testify at trial. This application only pertains to the availability of cost-shifting at the conclusion of the case.

Thank you for your consideration of this application.

Respectfully submitted,

Eric Hecker

cc: All Counsel

EXHIBIT A

SUFFOLK COUNTY, NEW YORK
OFFICE OF THE MEDICAL EXAMINER

REPORT OF AUTOPSY

NAME: DAINELL SIMMONS ME#: 13-03100

AUTOPSY PERFORMED BY: Maura DeJoseph, D.O. DATE: July 25, 2013

FINAL ANATOMIC DIAGNOSES

I. PRONE POSITIONING AND CHEST COMPRESSION
   - A. CUTANEOUS AND MUCOSAL PETECHIAL HEMORRHAGES
   - B. CONTUSIONS OF ANTERIOR TORSO
   - C. PULMONARY AND THYMIC CONGESTION
   - D. PETECHIAL HEMORRHAGES OF EPIGLOTTIS

II. BLUNT IMPACT INJURIES OF HEAD WITH CUTANEOUS ABRASIONS AND CONTUSIONS

III. BLUNT IMPACT INJURIES OF TORSO WITH CUTANEOUS CONTUSIONS

IV. BLUNT IMPACT INJURIES OF EXTREMITIES WITH CUTANEOUS CONTUSIONS AND ABRASIONS

V. TASER-RELATED INJURIES
   - A. TASER DART RECOVERED

VI. HYPERTENSIVE AND ATHEROSCLEROTIC CARDIOVASCULAR DISEASE
   - A. CARDIAC HYPERTROPHY (425 GRAMS)
   - B. CORONARY ARTERY DISEASE, SLIGHT

VII. OBESITY
   - A. BODY MASS INDEX: 39.38
   - B. ANTERIOR SUBCUTANEOUS ADIPOSE TISSUE: 1-3/4 INCHES
   - C. HEPATIC STEATOSIS, SLIGHT

CAUSE OF DEATH: SUDDEN DEATH DURING VIOLENT STRUGGLE INCLUDING PRONE POSITIONING AND CHEST COMPRESSION IN A PERSON WITH OBESITY WITH HYPERTENSIVE CARDIOVASCULAR DISEASE

MANNER OF DEATH: HOMICIDE (INJURED BY OTHERS)

Maura DeJoseph, D.O.
Deputy Medical Examiner
10/11/13
Date

MED/med

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY.

OFFICE OF THE MEDICAL EXAMINER SUFFOLK COUNTY, N.Y.

DAINELL SIMMONS CASE 13-03100

I hereby certify that I, Maura DeJoseph, D.O., Deputy Medical Examiner, have performed an external examination and an autopsy on the body identified as Dainell Simmons on July 25th, 2013 at 10:30 AM and July 26th at 12:00 PM, respectively, at the Suffolk County Medical Examiner's Office.

EXTERNAL EXAMINATION:
The unclothed body is that of a well developed, well nourished, obese, 5 foot 6 inch, 244 pound black man whose appearance is consistent with the reported age of 29 years. Muscular rigidity is slight (arriving) and lividity is non-fixed, purple and posterior in the cool body.

The face is plethoric. The scalp displays short black hair measuring up to 1/8 inch. There is a 1/8 inch moustache and beard. The irides appear brown, the conjunctivae are congested, and the sclerae are anicteric. The nose is atraumatic. The lips are free of abrasion, contusion or laceration. The mouth contains natural dentition in good repair. The frenula are intact. The external genitalia are those of a circumcised adult male with descended testes.

THERAPEUTIC INTERVENTIONS:
An endotracheal tube is in place and a tube holder with strap is around the neck. There are intravenous catheters of the dorsal left hand and right antecubital fossa. There is a puncture site with gauze of the dorsal right hand. A bladder catheter is in place.

SCARS/SKIN:
There are few short irregular scars of the midline forehead, at the hairline, the left shin (horizontal) and the distal right shin/ankle (horizontal). There is a congenital pit slightly anterior to the superior aspect of the attachment of the right ear lobe.

INJURIES, EXTERNAL AND INTERNAL:
There are injuries related to chest compression, blunt impact injuries of the head, torso and extremities and also Taser discharges. Injuries are described by region with the body in standard anatomic position; no sequence is implied.

CHEST COMPRESSION:
There are three light pink contusions of the anterior right shoulder (1/8 inch, 1/8 inch and 1/2 inch). There are two light pink contusions of the anterior left shoulder (1/8 inch and 1/4 inch). There is a 1/2 inch light pink contusion inferior to the right nipple. There is a 2 inches x 1 inch cluster of 1/8 inch purple contusions of the sternal to just supraxiphoid chest. There is a 1/4 inch faint pink-purple contusion of the left infrascapular back. There is a 3 inches x 1 inch cluster of dark purple contusion over the left flank, in an area of striae. There are clusters of petechiae of the top and posterior of the bilateral shoulders/trapezius back. There are petechiae of the skin of the upper eyelids and bitemporal face. There are mucosal petechiae of the palpebral and bulbar conjunctivae as well as the oral mucosa. There is a 1/4 inch mucosal hemorrhage of the right lower lip, just lateral to the mandibular frenulum.

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Internally, there is focal 3/4 inch subcutaneous hemorrhage overlying the mid sternum. The thymic remnant is congested. There are few petechial-type hemorrhages of the mucosa of the epiglottis.

BLUNT IMPACT INJURIES OF HEAD:

There is a 1/2 inch abraded contusion of the glabella. There is a 1/16 inch abraded contusion of the lateral right supraorbital face. There is no subscalpular hemorrhage. There is a 1 inch x 1/2 inch cluster of irregular hemorrhages deep within the left temporalis muscle. There is a 1/8 inch focal hemorrhage deep within the right temporalis muscle. There is no epidural, subdural or subarachnoid hemorrhage. The calvarium is increased in thickness but is free of fracture. The leptomeninges are glistening and transparent. There are no fractures in the skull base. The brain weighs 1230 grams and has normally distributed cranial nerves and cerebral vessels. The gyri and sulci have normal configurations. There is no herniation. The white and gray matter, deep nuclei and ventricles are unremarkable. There are no focal lesions.

BLUNT IMPACT INJURIES OF TORSO:

There is a 1 inch x 1/8 inch diagonal (up on left) area of slightly purple-brown hyperpigmentation of the left posterior base of the neck. There are two diagonal bands of slightly purple-brown hyperpigmentation of the right posterior base of the neck (2 inches superior and 2-1/2 inches inferior), separated by 1/2 inch. There is no subcutaneous hemorrhage corresponding to the previously described impressions (comment: may represent impressions from therapeutic intervention/neck collar).

Dissection of the posterior subcutaneous soft tissues of the neck and torso reveals unremarkable adipose and skeletal muscle, without hemorrhages. There is no hemorrhage in the paratracheal soft tissues. There is 1/4 inch focal hemorrhage in the midportion of the right sternocleidomastoid muscle, just beneath the fascia. The other anterior strap muscles are unremarkable. There is no injury of the cervical vertebra, hyoid bone, tracheal or laryngeal cartilages. The upper airway is patent and free of foreign material. There are no hemorrhages in the posterior neck musculature. There is focal hemorrhage of the laryngeal mucosa overlying the left arytenoid cartilage (1/8 inch) and the midline to slightly right laryngeal mucosa (1/8 inch).

BLUNT IMPACT INJURIES OF EXTREMITIES:

Upper Extremities: There is a 1 inch x 1/2 inch abrasion of the left elbow. There is a faint pink 1/8 inch contusion of the dorsal left mid forearm. There is a 1/4 inch purple contusion of the left ulnar wrist. There are two parallel horizontal lines of contusion of the left wrist, 2-3/4 inches long on the dorsal wrist and each 1/8 inch wide. They are separated by 1/4 inch. There is no contusion of the ventral left wrist. There is a 1/2 inch flapped abrasion within the ulnar aspect of the previously described contusion.

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There is 1 inch slightly curved contusion of the ventral left mid forearm. There is 2 inches slightly curved, faint pink contusion of the ventral left mid forearm, distal to the one previously described.

There is a 2 inches x 1 inch cluster of purple contusions of the anterior upper left arm.

Dissection of the subcutaneous tissues of the left upper extremity reveals focal hemorrhage overlying the left elbow. The bony prominences are not fractured.

There are three 1/2 inch purple contusions of the dorsal right mid forearm. There is a 1 inch raised blue-purple contusion of the ulnar distal right forearm. There is a 2 inches x 1/16 inch faint red linear contusion of the dorsal right wrist. There are two dark purple-red linear contusions of the ulnar right wrist (proximal 1/4 inch wide x 1 inch long, distal 1/8 inch wide x 1 inch long). There is a 1/4 inch purple contusion at the base of the right 5th digit. There are three 1/4 inch faint purple contusions of the ventral right mid forearm. There is a 1/4 inch abrasion of the ventral radial right wrist.

Dissection of the subcutaneous tissues of the right upper extremity reveals dense hemorrhage beneath the contusions of the dorsal right forearm and wrist.

Lower Extremities: There are two parallel faint pink horizontal contusions of the distal right ankle, encircling the ankle and measuring 7-3/4 inches around. Each contusion measures 1/4 inch wide with a 3/4 inch gap between the contusions. There are two parallel, horizontal, faint contusions of the distal posterior and lateral left ankle measuring 3 inches around, 1/2 inch overall width, with each contusion measuring 3/16 inch and a 1/8 inch space between the contusions. There is a 1/16 inch abrasion of the dorsal left third toe. There are faint, slightly curved impressions of the dorsal feet, without contusion.

Dissection of the subcutaneous tissues of the lower extremities reveals only faint superficial hemorrhage beneath the anterior right ankle contusion. There are no posterior hemorrhages of the lower extremities.

TASER – RELATED INJURIES:

Anterior Torso: There is a Taser dart contact site of the right upper abdominal quadrant. The site is a 1/4 inch circular abrasion with a 1/16 slightly triangular central puncture. The dart entrance is centered 21-1/2 inches below the top of the head and 5-1/4 inches right of midline.

The Taser dart is embedded in the subcutaneous adipose tissue. There is slight hemorrhage in the surrounding adipose tissue. The dart is removed and submitted to Ballistics.

There is a Taser dart contact site of the midline sternal chest. The site is a 1/16 inch triangular puncture with a 1/4 inch rim of contusion. It is centered in the midline of the body and 13 inches

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below the top of the head. There is no dart in the wound. There is hemorrhage in the subcutaneous tissues corresponding to the site and immediately overlying the sternal bone.

Posterior Torso: There is a Taser dart contact site of the right infrascapular back. It is a 1/16 inch triangular puncture with a 1/4 inch abrasion from 2 o'clock to 4 o'clock. There is a 1/4 inch contusion lateral to the abrasion. It is centered 17-1/2 inches below the top of the head and 2-1/4 inches right of midline. There is no dart in the wound.

There is a Taser dart graze abrasion of the right infrascapular back. It is a 1-1/4 inches x 1/8 inch diagonal abrasion (up on the right). It is centered 20 inches below the top of the head and 3 inches right of midline. The epidermis is abraded with skin tags; there is no deep injury. The skin tags point in a superior direction.

The injuries described above will not be repeated.

INTERNAL EXAMINATION:

GENERAL:
The pericardial, pleural and peritoneal surfaces are smooth and shiny and the cavities contain trace serous fluid. The thoracic, abdominal and pelvic organs are in the usual anatomic locations. The anterior subcutaneous adipose tissue is 1-3/4 inches thick.

CARDIOVASCULAR SYSTEM:
The heart weighs 425 grams. The epicardial surfaces are smooth. The coronary arteries course over the surface of the heart in a right dominant distribution. There is slight, focal atherosclerosis of the coronary arteries: left main (0%), left anterior descending (proximal 0%, mid 10%%, distal 0%), circumflex (proximal 0%, mid 0%, distal 0%) and right (proximal 10%, mid 0%, distal 0%). The atria are slightly dilated and the appendages are free of thrombus. The foramen ovale is closed. The ventricular chambers are slightly dilated. The left and right ventricle walls are 1.0 centimeters and 0.2 centimeter thick, respectively. The interventricular septum is 1.0 centimeter thick. The four cardiac valves have the usual anatomic configuration and are smooth and delicate. The endocardial surfaces are unremarkable. The myocardium is tan-brown to red-brown and homogeneous.

GREAT VESSELS:
The great vessels arise from the heart in the usual anatomic configuration. There is no atherosclerosis of the aorta. The venae cavae and pulmonary arteries are without thrombi and emboli.

RESPIRATORY SYSTEM:
The laryngeal mucosa, vocal cords and tracheal mucosa are unremarkable. The right and left lungs weigh 575 grams and 525 grams, respectively. The lungs have proper lobation and slight posterior congestion. Hilar dissection reveals pink-tan bronchial mucosa. There is no atherosclerosis or thromboembolus in the parenchymal vessels. The parenchyma is red-brown

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Nicole Falcone

and congested with frothy fluid exuding from the cut surfaces. There is no mass, infarct, consolidation or emphysema.

LIVER, GALLBLADDER AND PANCREAS:
The liver weighs 1975 grams and has an atraumatic smooth capsule with a sharp edge. The parenchyma is tan-brown with scattered 2 millimeter dark green-brown intraparenchymal lesions that likely represent von Meyenberg complexes. The thin walled gallbladder contains 5 cubic centimeters of amber bile, without stones. The extrahepatic biliary tree is normally configured. The pancreas has the usual lobulation, color and texture. The duct is nondilated.

HEMIC AND LYMPHATIC SYSTEMS:
The spleen weighs 160 grams, has an intact smooth capsule and dark red parenchyma. There is no lymphadenopathy. The bone marrow is unremarkable.

GENITOURINARY SYSTEM:
The right and left kidneys weigh 200 grams and 175 grams, respectively. The kidneys have slightly granular red-brown surfaces. The cut sections show sharply demarcated corticomedullary borders and cortices of normal thickness. The renal pelves are nondilated and free of mucosal lesion. The ureters maintain uniform caliber into a non-trabeculated bladder containing 1 to 2 cubic centimeters of cloudy yellow urine. The prostate and scrotal testes are unremarkable.

ENDOCRINE SYSTEM:
The pituitary, thyroid and adrenal glands are normal color, size, consistency and location.

DIGESTIVE SYSTEM:
The esophagus and gastroesophageal junction are free of ulcer or mass. The stomach contains approximately 550 cubic centimeters of tan-gray thin liquid. The gastric mucosa has lost the usual rugal folds. The small and large bowel are normally rotated. There are no narrowings, dilatations, fistulae, diverticuli or masses in the loops of bowel. The vermiform appendix is present.

MUSCULOSKELETAL SYSTEM:
The vertebrae, clavicles, sternum, ribs and pelvis are without fracture. The musculature is normally distributed and developed.

HISTOLOGY:
Specimens are submitted for microscopic examination; a separate report will be issued.

TOXICOLOGY:
Specimens are submitted for toxicological analysis; a separate report will be issued.

MED/med
D external: 7/25/2013
D autopsy: 7/26/2013
F: 10/11/2013

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SUFFOLK COUNTY, NEW YORK
OFFICE OF THE MEDICAL EXAMINER

REPORT OF MICROSCOPIC EXAMINATION

NAME: DAINELL SIMMONS ME#: 13-03100

MICROSCOPIC EXAMINATION

HEART AND CORONARY ARTERY (slide # 9, 10) x 5:
Scattered hypertrophied myocytes; there is no disarray. Slight perivascular fibrosis. Slight subintimal accumulation of foamy macrophages and connective tissue in coronary artery.

LUNG (slide # 8) x 3:
Vascular congestion. Accumulation of acellular fluid in alveolar spaces. Scattered alveoli with red blood cells.

LIVER (slide # 7) x 1:
Sinusoidal congestion. Slight macrovesicular steatosis.

KIDNEY (slide # 7) x 1:
Marked congestion of the renal medulla. Few foci of interstitial hemorrhage of subcapsular cortex.

SKIN AND SUBCUTANEOUS TISSUE, RIGHT SHOULDER (slide # 1) x 2:
Focal acute hemorrhage in subcutaneous adipose tissue.

SKIN AND SUBCUTANEOUS TISSUE, ANTERIOR UPPER RIGHT ARM (slide # 2) x 1:
Focal acute hemorrhage in subcutaneous adipose tissue.

SKIN AND SUBCUTANEOUS TISSUE, INFERIOR TO RIGHT NIPPLE (slide # 3) x 1:
Foci of extravasated red blood cells in dermis.

SKIN AND SUBCUTANEOUS TISSUE, XIPHOID CHEST (slide # 4) x 1:
Vascular congestion.

SKIN AND SUBCUTANEOUS TISSUE, LEFT SHOULDER, SUPERIOR (slide # 5) x 1:
Foci of extravasated red blood cells in dermis.

SKIN AND SUBCUTANEOUS TISSUE, LEFT SHOULDER, INFERIOR (slide # 6) x 1:
Foci of extravasated red blood cells in dermis.

SKELETAL MUSCLE, RIGHT STERNOCLEIDOMASTOID (slide # 13) x 1:
Acute hemorrhage between muscle fibers.

SKELETAL MUSCLE, RIGHT TEMPORALIS MUSCLE (slide # 11) x 1:
Unremarkable skeletal muscle.

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OFFICE OF THE MEDICAL EXAMINER

SUFFOLK COUNTY, N.Y.

DAINELL SIMMONS

CASE 13-03100

SKELETAL MUSCLE, LEFT TEMPORALIS MUSCLE (slide # 12) x 1:
Acute hemorrhage between muscle fibers.

SKIN AND SUBCUTANEOUS TISSUE, UPPER INNER LEFT ARM (slide # 14) x 1:
Extravasated red blood cells in dermis.

SKIN AND SUBCUTANEOUS TISSUE, ANTERIOR RIGHT ANKLE (slide # 15) x 1:
Unremarkable.

Maura DeJoseph, D.O.
Deputy Medical Examiner
10/11/13
Date

MED/med
/21/2013

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A TRUE AND CORRECT COPY.